Jonathan C. Higbee
1611 East Deauville Avenue
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Amateur Radio Licensee N7HGM
email: n7hgm@wa7slg.ampr.org
February 5, 1999

Federal Communications Commission
1919 M Street N.W.
Washington DC 20554

RE: Comment on the commission's plan to create a low power radio service.

Greetings.

Because the FCC has no right to regulate radio transmissions which do not cross state borders, they have no right to stop current so-called "pirate" stations from broadcasting.

Fundamentally the electromagnetic spectrum belongs to everyone. No agency has a right to say what we can or cannot do with a medium which is just as much as part of our existence here as is the air we breath.

I would like you to keep these key principals in mind as you consider how to go about creating a low power radio service. The less regulation in this area the better. The less licensing requirements in this area the better. The less micromanagment by your agency the better. The more freedom to operate by the low power broadcasters the better.

There should in fact be zero regulation in this area because you have no right to regulate in this area in the first place, but if you must act, act in a way that provides the most freedom to the low power broadcaster.

Attached to this comment is a letter I have written to the Chairman of the FCC regarding the general issue of low power radio transmissions and the FCC's past inappropriate actions in this area. Perhaps the additional information I have provided will give you some more context, and prompt you to do the least harm to the INDIVIDUALS who's inherent right it is to use the spectrum THEY own.

Sincerely,

Jonathan C. Higbee

Attachments: 25 pages of my February 4 letter to the Chair of the FCC regarding low power radio, and an added conclusionary comment by me on page 27.

COPY

Jonathan C. Higbee
1611 East Deauville Avenue
Cottonwood, Utah 84121-1899
Amateur Radio Licensee N7HGM
February 4, 1999

Chairman William E. Kennard
Office of the Secretary
Federal Communications Commission
The Portals
445 12th Street SW
Washington, D.C. 20554

Dear Mr. Kennard,

After reading of the abuses of your agency with regard to low power radio transmission, and also that legally your agency has no right to regulate intrastate radio transmissions, I have come to the conclusion that the majority of the actions of your agency fall right in line with how much of the federal government is operating - in a manner which betrays your trust as public servants.

For example, your Minneapolis field office acted inappropriately when they decided to prosecute Roy Neset, a North Dakota farmer who merely wanted to listen to a talk radio station via satellite, and who's actions could not have inferred with any surrounding stations because his low power broadcasting on 88.3 MHz went out in a five mile radius, with there being no other FM broadcast stations in his area period!

The over zealous jack-booted thuggery of your agents pales in comparison to what the "rule of law" is supposed to be about.

Do we have the rule of law, or the rule of thugs and of totalitarian micromanagers?

Enclosed for your information and reference are copies of additional information I have gathered on the subject of low power radio and of how your agency is going far beyond what you have a right to do. If you are in fact making efforts to allow low power broadcasting, then I expect you to immediately drop your case against Mr. Neset, and any other harmless or mostly harmless lower power broadcaster.

Sincerely,

Jonathan C. Higbee

Note: The text on the following pages are copyrighted by the authors listed. I am including these extra documents by other authors to give some background on my positions.

Note: The next three pages consist of a relevant Usenet article I found by Scott G. Bullock. I include his comments as an attachment to mine because I agree with his conclusions about the abuses of the FCC with regard to low power radio. I used www.dejanews.com to find his posting.

Message 1 of 1 *for search*

help

FREE THE AIRWAVES

Author:

believerKILLSPAM@telepath.com (******) *<believerKILLSPAM@telepath.com>*

Date:

1999/01/06

Forum:

alt.radio.pirate

Source: Investors Business Daily

FREE THE AIRWAVES

By SCOTT G. BULLOCK

What do a North Dakota farmer, a Berkeley political radical and a

Connecticut gospel radio-station owner have in common? They're all considered outlaws in the Federal Communications Commission's misguided campaign to get rid of low-power radio.

Roy Neset's Tioga, N.D., farm isn't quite in the middle of nowhere, but it's close. Neset wanted to listen to talk radio while cultivating his fields on his tractor. But the only radio station in the area plays country music and refused to change its programming.
So Neset bought a low-power radio transmitter, got written permission from a Colorado station to carry its signal and began transmitting that station via satellite. Neset's station extends only about five miles in each direction, most of which consists of his farm. His station is also listened to by a handful of people in the area. When the local radio station manager learned of Neset's broadcasts, he complained to the FCC's field office in Minneapolis. The FCC sent an agent to Tioga on at least two occasions to monitor the station. On learning that Neset was broadcasting on 88.3 FM without a license, the FCC convinced the U.S. Attorney in North Dakota to file a lawsuit. During a hearing, the FCC admitted that Neset wasn't interfering with any existing station. In fact, no FM stations broadcast in the area. But the agency stuck with its argument that it's illegal to broadcast
without a license.

So why doesn't Neset simply get a license from the FCC? He can't. The FCC allowed small broadcasters to acquire Class D licenses until '80. That gave them the right to broadcast at 10 watts. But the Corporation for Public Broadcasting, among others, convinced the FCC that 10-watt stations would clutter the lower end of the radio spectrum that might otherwise carry National Public Radio. The result? The FCC stopped issuing Class D licenses, and small stations were squeezed off the air. This regime left pockets of unused parts of the airwaves - too small for full-power stations, but perfect for small ones. But listeners' growing displeasure with homogeneous radio, along with affordable transmission gear, has led to an upswing in microradio stations - and FCC crackdowns. It's estimated that as many as 1,000 ''pirate'' stations are on the air today. The FCC took more than 100 actions against micro-broadcasters in '98 alone.

Although people often associate low-power broadcasting with the political left, microradio has received support from free-market economists and libertarians for decades. Economists such as Thomas Hazlett and Nobel Laureate Ronald Coase argue that orderly allocation of the broadcast spectrum would be much better served by recognizing private property rights in the spectrum.

Any interference with those rights, they say, should be treated as a tort. The current FCC system of licensing, regulation and control would be unnecessary.

Other economists have undermined the FCC's rationale for banning

microradio - the supposed ''scarcity'' of broadcast frequencies. Scarcity of valuable goods is a universal fact and can't serve as justification for regulating one activity and not another.
But the explosion of new communications technologies in the past 30 years shows the obsolescence of the scarcity doctrine.
Creating a system for the limited regulation of microradio could fulfill the FCC's interest in regulating the spectrum without trampling on the First Amendment.

The FCC could create a similar system of licensing micro-broadcasters, assigning frequencies and monitoring technical and safety requirements that exist for full-power broadcasters.

Better still, instead of licensing, the government could merely set up rules for microradio broadcasters that would bar interference with existing stations.

The one thing the FCC may not do, though, is completely ban microradio. Such a prohibition sweeps far beyond what's necessary or justified and is not ''narrowly tailored'' as required under the First Amendment.

Until the legal issues are resolved, the FCC should take a ''do no harm'' approach. If the agency can show that an unlicensed station is interfering, then it can take action. But until the FCC permits micro-broadcasting, it should allow farmer Neset and hundreds like him to exercise their free speech rights on the airwaves. Scott G. Bullock is an attorney at the Washington-based Institute for Justice, which represents Roy Neset in his prosecution by the FCC.
//

Investor's Business Daily - Viewpoint (01/05/99)
Free The Airwaves01/04/99 20:48

****
See actual court documents filed by microbroadcasters,
as well as those filed by the FCC/DOJ goon squads, at
URL below.
http://www.telepath.com/believer
The Low-Power Broadcasting Page

Note: The next 20 pages consist of an article by David Moore, as found at http://www.telepath.com/believer/lowpwr.htm discussing how the FCC oversteps the legal bounds set for it when it acts to stop microbroadcasters.

FCC FRAUD

(Revised 10-24-98)

FEDERAL COMMUNICATIONS COMMISSION AUTHORITY AND JURISDICTION IN THE SEVERAL STATES OF THE UNION:

FACT OR FRAUD?

A Memorandum by David Moore

This memorandum will be construed to comply with provisions necessary to establish presumed fact (Rule 301, Federal Rules of Evidence, and attending state rules) should interested parties fail to rebut any given allegation of fact or matter of law addressed herein. This position will be construed as adequate to meet requirements of judicial notice, thus preserving fundamental law. Matters addressed herein, if not rebutted, will be construed to have general application. This memorandum addresses authority and jurisdiction of the Federal Communications Commission.

INTRODUCTION

The growing interest in and popularity of "low-power" radio stations in the AM and FM broadcast bands in America is a phenomenon with the potential of sweeping the nation. Thousands of people are operating "low-power" transmitters (typically capable of generating less than 100 watts) in an effort to provide an alternative to the type of broadcast programming which currently dominates the airwaves offered by the well-funded media giants. It appears, however, that many do so ignorantly, believing themselves and their fellow-broadcasters to be unlicensed "pirates" violating the rules and regulations of the Federal Communications Commission (FCC), and surviving only because of the FCC's limited ability to enforce the "law."

Are these people "pirates," criminals flaunting the law at the expense of others, or have they simply been led to believe this by a government agency that capitalizes on the ignorance of the general population? Is the FCC enforcing the law when it prosecutes low-power broadcasters, or is it engaged in perpetrating a grievous fraud against the American people?

These questions can only be answered by following one simple rule: believe nothing unless you can prove it in your own research.

This memorandum should neither be considered exhaustive nor as legal advice, but only as a starting point for one's own research. It is hoped that others will expand upon this memorandum and dig even deeper to further expose the true nature of the FCC.

NOTE

All common definitions of words are taken from Webster's Seventh New Collegiate Dictionary, and shall be referred to simply as "Webster's." All legal definitions of words are taken from Black's Law Dictionary with Pronunciations, Sixth Edition, and shall be referred to simply as "Black's." A more complete understanding of the various issues being argued and litigated across the country regarding "microbroadcasting," as well as an opportunity to view many of the actual legal and court documents involved, may be found on the Internet's World Wide Web at "http://www.telepath.com/believer" on the "Low Power Broadcasting" page.

PART ONE: CREATION AND PURPOSE OF THE FCC

47 CFR Sec. 0.405 Statutory Provisions

The following statutory provisions, AMONG OTHERS, will be of interest to PERSONS HAVING BUSINESS with the Commission [emphasis added]:

(a) The Federal Communications Commission was created by the Communications Act of 1934, 48 Stat. 1064, June 19, 1934, as amended, 47 U.S.C. 151-609.

(b) The Commission exercises authority under the Submarine Cable Landing Act, 42 Stat. 8, May 27, 1921, 47 U.S.C. 34-39....

(c) The Commission exercises authority under the Communications Satellite Act of 1962, 76 Stat. 419, August 31, 1962, 47 U.S.C. 701-744.

(d) The Commission operates under the Administrative Procedure Act, 60 Stat. 237, June 11, 1946, as amended, ... the provisions of the Administrative Procedure Act now appear as follows in the Code:

Administrative Procedure Act 5 U.S.C.

Sec. 2-9 - 551-558

Sec. 10 - 701-706

Sec. 11 - 3105, 7521, 5362, 1305

Sec. 12 - 559

This section of the Code of Federal Regulations (CFR) lists items pertinent to the FCC which have been provided for by statute. Let us examine some of them in detail.

47 U.S.C. Sec. 151 Purposes of Chapter; Federal Communications Commission Created

For the purpose of regulating interstate and foreign commerce in communication by wire and radio...there is created a commission to be known as the “Federal Communications Commission”....

The FCC was created by an ACT OF CONGRESS (we will get to that later) “for the purpose of regulating interstate and foreign commerce....” The power of law is in the details, especially the definitions of words and phrases. Just what is “interstate and foreign commerce in communication by wire and radio”?

The common meaning of the word “interstate” is “of, connecting, or existing between two or more states....”

“Commerce,” in this context, means “the exchange or buying and selling of commodities on a large scale involving transportation from place to place.”

“Foreign” means “situated outside a place or country.”

When thinking of “foreign commerce,” most people would imagine trade with China or Spain. However, definitions in law are often different from commonly understood definitions, as we shall shortly see.

Black’s has separate definitions for “foreign,” “foreign nations,” “foreign states,” “foreign commerce,” “commerce with foreign nations,” “nation,” “country,” “interstate,” “commerce,” “interstate commerce,” “interstate and foreign commerce,” and “state.” The serious researcher should examine all of these definitions, as their thorough study could easily fill an entire book, and will not be attempted here.

In Black’s we find:

> Interstate commerce. Traffic, intercourse, commercial trading, or the transportation of persons or property between or among the several states of the Union, or from or between points in one state and points in another state; commerce between two states, or between places lying in different states....

Also from Black’s:

> Interstate and foreign commerce. Commerce between a point in one State and a point in another State, between points in the same State through another State or through a foreign country, between points in a foreign country or countries through the United States, and commerce between a point in the United States and a point in a foreign country or in a Territory or possession of the United States, but only insofar as such commerce takes place in the United States. The term “United States” means all of the States and the District of Columbia. 49 U.S.C.A. Sec. 10102.

Note the differences between these two definitions — subtle, yet distinct.

What is the difference between a state (not capitalized) and a State (capitalized)? Are they the same as one of the “several states of the Union”? Why is the word “state” capitalized in one place and not in another? What is the difference between the “United States” and the “several states of the Union”?

It is no accident that the alternate use of “state,” “State,” “United States,” and “several states of the Union” is found throughout the entire American law, as well as Black’s; yet neither offer clear reasons for this important situation. Again, a thorough study of this subject could easily fill an entire book, and will not be attempted here. However, a clue may be found in one particular definition from Black’s:

> State/Foreign state. A foreign country or nation. The several United States are considered ‘foreign’ to each other except as regards their relations as common members of the Union.

In essence, the “several states of the Union” are foreign and sovereign countries, with different laws, etc. That is why people living in Kansas are not subject to the laws of Texas, and vice versa. In fact, further research indicates that the “several states of the Union” are foreign to the “United States,” and the federal government!

Even further research indicates that people living in “the several states of the Union” are not subject (except in specific, limited cases) to the laws of the “United States,” any more than they are subject to the laws of France! (The astute researcher will notice that the definition above does not mention the “several states of the

Union," but instead mentions "the several United States," indicating that, just as there is more than one "state," there is more than one "United States." These concepts are quite astounding to most people and, in an effort to unravel and understand them, the unprepared researcher may rapidly develop a headache!)

If words are to have meaning, and laws made up of words are to be enforced, there must be a way to understand the meanings of the words used in the law. Many court decisions have stated this concept, such as the following:

> (The) correct format for evaluating (the) constitutionality of (a) statute is: is (the) expression of crime so clearly explicit that every person of ordinary intelligence may understand specific provisions thereof and determine in advance what is and is not prohibited. — Whaley v. State, Okl. Cr., 556 P.2d 1063 (1976).

In other words, if the ordinary man on the street cannot understand the law, then that law is probably unconstitutional!

How can the law relating to the FCC be understood? The answer lies, among other places, in the DEFINITIONS of words contained in the law itself. Words contained in law can have meanings other than those commonly understood, as long as those definitions are PART of the law. Therefore, "green" can be defined as "blue," as long as that definition is contained in the law, and this is all perfectly "legal."

This approach to understanding the law, especially as it relates the the FCC, is what I call the "definitions argument," as it hinges upon the definitions of the phrases "interstate and foreign commerce," "United States," and the words "state," "means" and "includes."

Since 47 U.S.C. Sec. 151 uses the phrase "interstate and foreign commerce," then we will adhere to that definition, as it is different from the definition of "interstate commerce."

> 47 U.S.C. Sec. 152 Application of chapter [CHAPTER 5]
>
> (a) The provisions of this chapter shall apply to all INTERSTATE AND FOREIGN communication by wire or radio and all INTERSTATE AND FOREIGN transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided....
>
> (b) Except as provided in Sections 223 through 227...and Section 332...and subject to the provisions of Section 310...and subchapter V-A of this chapter, NOTHING in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with INTRASTATE communication service by wire or radio....[emphasis added]

Here, the statute makes a somewhat deceptive departure from the phrase "interstate and foreign commerce," and changes to "interstate and foreign communication" and "interstate and foreign transmission of

energy by radio," and attempts to "include" activities outside of "commerce." While "communication" and "transmission of energy by radio" may seem to imply a two-way "exchange" (i.e., "commerce"), it is quite possible that both may be limited to simply a one-way "broadcast."

However, the above section SEEMS clear enough — 47 U.S.C. Chapter 5 applies only to interstate (between states) and foreign matters, and NOT to "intrastate" (within a state) matters. Notice, however, the word "except" in (b). "Except as provided in...." The sections mentioned in (b) deal with the following:

Sec. 223 - Obscene or harassing telephone calls....

Sec. 224 - Pole attachments (connecting wires, etc. to utility poles)

Sec. 225 - Telecommunications services for hearing-impaired and speech-impaired individuals

Sec. 226 - Telephone operator services

Sec. 227 - Restrictions on use of telephone equipment

Sec. 332 - Mobile services (such as car phones)

Sec. 301 - License for radio communication or transmission of energy

Subchapter V-A - Cable communications

Only Sec. 301 deals with radio and its pertinent sections read as follows:

47 U.S.C. Sec. 301 License for radio communication or transmission of energy

It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission...but not the ownership thereof....

No person shall use or operate any apparatus for the transmission of energy for communications or signals by radio (a) from one place in any State, Territory or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory or possession of the United States, of from the District of Columbia to any other State, Territory or possession of the United States; or

(c) from any place in any State, Territory or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State... EXCEPT UNDER AND IN ACCORDANCE WITH THIS CHAPTER and with a license in that behalf granted UNDER THE PROVISIONS OF THIS CHAPTER. [emphasis added]

This section is one that is pointed to by many ham radio operators, who proudly proclaim they have complied with "the law," by working so hard to obtain their Amateur Radio "License." But, if they had carefully read this statute they would have discovered what appears, on the surface, to be a glaring contradiction.

If the purpose of the FCC is to regulate "interstate and foreign commerce," and the provisions of 47 U.S.C.

Chapter 5 “apply to all interstate and foreign communication,” and NOT “intrastate communication,” then how can a person be forbidden to broadcast “from one place in any State...to another place in the same State” without first being granted a license?

A key to understanding Section 301 may exist in the definitions found in Section 153, and an understanding of the word “includes.”

47 U.S.C. Sec. 153 Definitions

(e) “Interstate communication” or “interstate transmission” means communication or transmission (1) from any State, Territory or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of subchapter II of this chapter (other than Section 223 of this title), include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission....

(cc) “Station license”, “radio station license”, or “license” means that instrument of authorization REQUIRED BY THIS CHAPTER or the rules and regulations of the Commission made PURSUANT TO THIS CHAPTER.... [emphasis added]

Why the authors of this statue used the word “means” in one place and the word “includes” in others remains a mystery. However, they do have distinctly different definitions which must be understood in order to unravel the purpose of the law.

The question is: how can a person be forbidden to broadcast “from one place in any State...to another place in the same State”?

47 U.S.C. Sec. 153 Definitions

(g) “United States” means the several States and Territories, the District of Columbia, and the possessions of the United States, but does not include the Canal Zone....

Note the use of the word “means” here. Since Black’s contains no pertinent definition of the word, we will turn to Webster’s:

Means. Usage 2: (1): to have in mind as a purpose: INTEND (2): to serve to convey, show, or indicate: SIGNIFY...

If “United States means the several States,” does it MEAN Texas or Ohio? Does it MEAN “the several states of the Union”?

47 U.S.C. Sec. 153 Definitions

(v) “State” includes the District of Columbia and the Territories and possessions....

Does (v) contain the words “Texas” or “Ohio”? NO! It most definitely does NOT.

But, one might say, aren’t Texas and Ohio “States”? Doesn’t this definition “include” them by inference, along with the other 48 “several states of the Union”?

The answer once again is a resounding NO!

Let us examine the words “include” and “includes.”

According to Black’s:

> Include. (Lat. inclaudere, to shut in, to keep within.) To confine within, hold as in an inclosure, take in, attain, shut up, contain, inclose, comprise, comprehend, embrace, involve. Term may, ACCORDING TO CONTEXT, express an enlargement and have the meaning of “and” or “in addition to,” or merely specify a particular thing already included within general words theretofore used. “Including” within statute is interpreted as a word of enlargement or of illustrative application as well as a word of limitation. [emphasis added]

This definition may surprise the novice researcher, who may also argue that the term should be interpreted as an enlargement. This must, however, be done “according to context,” “and with a different intention apparent.”

From the “Legal Thesaurus,” Deluxe Edition, by William C. Burton, MacMillan Publishing Company:

> Include, verb — absorb, (Lat.) “adscribere,” be composed of, be formed of, be made up of, begird, boast, bound, bracket, circumscribe, classify, close in, combine, compass, (Lat.) “complecti,” comprehend, (Lat.) “comprehendere,” consist of, consolidate, contain, cover, embody, embrace, encircle, encompass, engird, envelop, girdle, hold, incorporate, involve, merge, put a barrier around, span, subsume, surround, take in, unify, unite.

And from “A Dictionary of Modern Legal Usage,” 2nd Edition, by Bryan A. Garner, Oxford University Press:

> Included. See “Including”.
>
> Including is sometimes misused for “namely.” But it should not be used to introduce an exhaustive list, for it implies that the list is only partial. In the words of one federal court, “It is hornbook law that the use of the word ‘including’ indicates that the specified list...is illustrative, not exclusive.” .... See “Including but not limited to.”
>
> Including but not limited to; including without limitation. In “drafting”, these cautious phrases are often essential to defeat three canons of construction: (Lat.) “inclusio unius est exclusio alterius” (“to express one thing is to exclude the other”), (Lat.) “noscitur a sociis” (“it is known

by its associates"), and (Lat.) "ejusdem generis" ("of the same class or nature"). .... Even though the word "including" itself means that the list is merely exemplary and not exhaustive, the courts have not invariably so held. So the longer, more explicit variations may be considered necessary....

Note that the definition in 47 U.S.C. Sec. 153 does not use the word "including" as a term of enlargement, but rather uses the more limiting word "include(s)." In the absence of an apparently different intention and based upon some understanding of the rules of construction of law, it is the conclusion of this author that there is NO contradiction between Section 301 and Section 151 and 152, because the definition of "State" in 47 U.S.C. does not "include" Texas, Ohio, Kansas, or any of the other "several states of the Union."

In the context of 47 U.S.C. and the FCC, the "United States" includes ONLY the District of Columbia and the Territories and possession of the United States.

This brings up an interesting situation in which it can be argued that "interstate and foreign commerce" and "communication" or "transmission" takes place ONLY among the District of Columbia and the Territories and possessions! Therefore, commerce, communication, or transmission between someone in Texas and someone in Kansas is not "interstate"! Thismay, however, be pushing the legal "envelope" a bit, and should, for now, be considered only as icing on what appears to be a well-defined cake.

Another important approach to the understanding and interpretation of 47 U.S.C. Sec. 301, apart from the "definitions argument," is what I call the "constitutionality arguement."

This approach does not challenge the definition of terms used in 47 U.S.C., and implies that the words and phrases contained therein may indeed "include" the "several States of the Union." Using this approach, it is easy to conclude that 301 is simply unconstitutional on it's face, as it obviously attempts to regulate activity that is solely intrastate in nature ("from one place in any State, Territory or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District"), and as written, exceeds the constitutionally delegated authority of Congress "...To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;" (Constitution for the united States of America, Art. 1, Sec. 8).

The "constitutionality arguement" has been expertly made in a motion written by attorney Larry Becraft in the case of "United States of America v. Arthur L. Kobres" (United States District Court, Middle District of Florida, Tampa Division, Case. No.97-470-CR-T-25(B)), a case which is currently unresolved on appeal. The motion's complete and compelling text may be found on the Internet's World Wide Web at "http://www.telepath.com/believer" on the "Low Power Broadcasting" page.

CONCLUSION OF PART ONE

The FCC exists solely to regulate "interstate and foreign commerce," that is, commerce between states and other states and/or countries. Pertaining to low-power radio broadcasters and stations, two possible scenarios unfold to explain and refute the FCC's current application of it's perceived authority:

1. Using the "definitions arguement," 47 U.S.C. Chapter 5 applies ONLY to interstate and foreign communication or transmission, and clearly does NOT apply to commerce, communication, or transmissions taking place solely within the confines of one of the several states of the Union, in part because the "several states of the Union" are not included in the definitions of the various entities subject to regulation by the FCC.

2. Using the "constitutionality arguement," 47 U.S.C. Sec. 301 is patently unconstitutional on it's face, as

it attempts to regulate activity that is solely intrastate in nature.

PART TWO: AUTHORITY AND JURISDICTION OF THE FCC

Bearing in mind that 47 U.S.C. Sec. 151 grants the FCC "authority with respect to interstate and foreign commerce in wire and radio communication," the rest of the law begins to fall in place and make sense, in particular Sec. 303, Powers and duties of Commission.

47 U.S.C. Sec. 303 describes various rule-making and regulation-making powers of the FCC, and certain provisions of this section are often quoted by the FCC in attempting to inspect, fine, seize, or otherwise shut down "violators." However, the very first sentence of this section should leap off of the page to the broadcaster who knows and understand his rights and legal standing:

47 U.S.C. Sec. 303 Powers and duties of Commission

Except as otherwise provided in this chapter...

That sentence sets everything that follows into the context of "interstate and foreign commerce," including the dreaded Section 303(n), which the FCC, operating under "color of law," uses as its alleged authority to conduct warrantless searches.

47 U.S.C. Sec. 303

(n) Have authority to inspect all radio stations associated with stations REQUIRED TO BE

LICENSED.... [emphasis added]

What stations are required to be licensed? Those engaged in "interstate and foreign commerce"!

The FCC has no authority to inspect any other facility, PERIOD!

It is important to examine other statutory provisions adding to the FCC's limited authority, found as follows:

47 CFR Sec. 0.405(b)

The Commission exercises authority under the Submarine Cable Landing Act, 42 Stat. 8....

47 U.S.C. 34-39....

The Submarine Cable Landing Act and 47 U.S.C. Sections 34-39 deal with submarine (i.e., underwater) cables:

...directly or indirectly connecting the United States with any foreign country....

Note the definition given in Sec. 38:

47 U.S.C. Sec. 38 "United States" defined

The term "United States" as used in Sections 34-39 of this title includes the "Canal Zone and

all territory continental or insular, SUBJECT TO THE JURISDICTION OF THE UNITED

STATES OF AMERICA." [emphasis added]

According to Black's:

Territory. A portion of the United States, not within the limits of any state, which has not yet

been admitted as a state of the Union, but is organized, with a separate legislature, and with executive and judicial officers appointed by the president.

It is also interesting to note that 47 U.S.C. Sections 34-39 are not listed in the Parallel Table of Authorities and Rules of the Code of Federal Regulations (CFR) Index. We will cover the significance of that omission later!

Another area where the FCC exercises authority is listed as follows:

47 CFR Sec. 0.405(c)

The Commission exercises authority under the Communications Satellite Act of 1962, 76 Stat. 419, August 31, 1962, 47 U.S.C. 701-744.

The Communications Satellite Act of 1962 and 47 U.S.C. Section 701-744 describe participation of the United States (in the form of a private corporation!) in a vast "commercial communications satellite system, as part of an improved global communications network." However, this Act, along with the Submarine Cable Act, appears to contain nothing applicable to low-power, intrastate broadcasting. Of note is the fact that Sec. 721, Implementation of Policy, which contains FCC functions, including rule- and regulation-making, is not listed in the CFR Parallel Tables of Authorities and Rules.

47 CFR Sec. 0.405(d)

The Commission operates under the Administrative Procedure Act....

This section lists sections of 5 U.S.C. which cover definitions, publication in the Federal Register, the Freedom of Information Act, rule-making, adjudications, court proceedings, hearings, sanctions, licenses, judicial review, relief, administrative law judges, government employees, and other administrative procedure matters which all federal agencies must observe. None of these sections shed any additional light on the authority and jurisdiction of the FCC relating to low-power intrastate broadcasting.

Other sections of 47 U.S.C. are pertinent to FCC jurisdiction.

47 U.S.C. Sec. 401 Enforcement provisions

(a) Jurisdiction. The district courts of the United States shall have jurisdiction...to issue a writ or writs of mandamus commanding such person to comply with the provisions of this chapter.

(b) If any person fails or neglects to obey any order of the Commission...the Commission...may apply to the appropriate district court of the United States for the enforcement of such order...the COURT shall enforce obedience.... [emphasis added]

The FCC has no authority whatsoever to command compliance or enforce obedience! That authority lies solely with the district courts of the United States.

47 U.S.C. Sec. 401 Enforcement provisions

(c) Duty to prosecute. Upon the request of the Commission IT SHALL BE THE DUTY OF ANY UNITED STATES ATTORNEY to whom the Commission may apply to institute

in the proper court and to prosecute under the direction of the Attorney General of the United States all necessary proceedings for the enforcement of the provisions of this chapter.... [emphasis added]

The FCC has no authority to institute court proceedings! That duty lies with “any United States attorney...under the direction of the Attorney General” to whom “the Commission may apply.” It is a little-known fact that you, too, may apply to any United States attorney to institute court proceedings.

CONCLUSION OF PART TWO

The authority and/or jurisdiction of the FCC is limited to regulating “interstate and foreign commerce.” The FCC only has authority to inspect radio installations which are “required to be licensed,” i.e., those engaged in “interstate and foreign commerce.” The FCC has no authority to institute court proceedings, or to command compliance with or enforce the law in any way whatsoever.

PART THREE: THE PARALLEL TABLE OF AUTHORITIES AND RULES

To quote Patrick E. Kehoe, Professor of Law, Director of the Law Library at The American University in Washington, D.C., in the Foreword to the Code of Federal Regulations Index:

In 1936 Congress passed legislation setting up the Federal Register and decreeing that any regulation issued by a federal agency, authorized either by Congress or the President, must appear in it in order for the regulation to have binding legal effect.... In 1937, Congress, recognizing the obvious need for a subject-based codification of current regulations, enacted further legislation establishing the Code of Federal Regulations.... The CFR is a specialized publication which is meant to include only those regulations which are considered to be of general effect.... The CFR is by law...considered to be prima facie correct statement of any regulation which it includes....

According to the “CFR Index and Finding Aids,” Revised as of January 1, 1996 as a special edition of the Federal Register:

The PTAR of the CFR lists the rule-making authority (except for 5 U.S.C. 301) for regulations codified in the CFR. Entries in the table are taken directly from the rule-making authority citation provided by Federal Agencies in their regulations.

To quote legal researcher Dan Meador:

Congress, as the legislative body for the United States, operates in at least two distinct capacities. First, Congress legislates for the state republics party to the Constitution within the framework of Constitutionally delegated authorities. Second, Congress legislates for the self-interested United States — the geographical United States, exclusive of the state republics.

Any given law Congress enacts vests administrative authority in a cabinet officer or board or commission in charge of whatever the legislation applies to. The officer or entity vested with original authority must then facilitate legislation with regulations. If regulations are published in the Federal Register, the statute or statutes the regulations facilitate can or do apply to the population at large and/or the states party to the Constitution. IF ANY GIVEN REGULATION IS NOT PUBLISHED IN THE FEDERAL REGISTER, THE NATION'S LEGAL NEWSPAPER, IT DOES NOT APPLY TO THE POPULATION AT LARGE OR THE STATE REPUBLICS. It applies only to federal agencies and officers, agents and employees of federal agencies, allowing for other applications within exclusively United States jurisdiction (District of Columbia, U.S.-owned territories and insular possessions and federal enclaves).

Authorities Confirming Necessity of Regulations

Application determined by 5 U.S.C. Sec. 552, et seq. and 44 U.S.C. Sec. 1501, et seq.; 44 U.S.C. Sec. 1505(a) specifies that when regulations are not published in the Federal Register, application is to federal agencies and officers, agents and employees of federal agencies....

SECTIONS THAT HAVE NO REGULATIONS ARE MANDATORY AND/OR ENFORCEABLE ONLY IN THE FEDERAL UNITED STATES, INCLUSIVE OF THE DISTRICT OF COLUMBIA AND U.S.-OWNED TERRITORIES....

The necessity for regulations was emphasized by the U.S. Supreme Court in California Bankers Ass'n. v. Schultz, 416 U.S. 21, 26, 94 S.Ct. 1494, 1500, 39 L.Ed. 2d 812 (1974): "Because it has a bearing on our treatment of some of the issues raised by the parties, we think it important to note that the Act's civil and criminal penalties attach only upon violation of regulations promulgated by the Secretary; if the Secretary were to do nothing, the Act itself would impose no penalties on anyone...."

"It is a well established principle of law that all federal legislation applies only within the territorial jurisdiction of the [federal] United States unless a contrary intent appears." — Foley Brothers v. Filardo, 336 U.S. 281 (1949)....

In other words, where the several States and the general population are concerned, a statute created by Act of Congress is somewhat like a hot air balloon that won't get off the ground until someone pumps in hot air. Regulations are to statutes as hot air is to the balloon. As

stated in 44 U.S.C.S. Sec. 1505(a)(1), if regulations for any given statute aren't published in the Federal Register, application is limited to Federal agencies or persons in their capacity as officers, agents, or employees of Federal agencies....

Fortunately, there is a reasonably easy way to discern what statutes in the United States Code have general application to the several States and the population at large. This is through the Parallel Table of Authorities and Rules....

Its authority is located at 1 CFR Sec. 8.5(a): "(a) Parallel tables of statutory authorities and rules. In the Code of Federal Regulations Index or at some other place as the Director of the Federal Register considers appropriate, numerical lists of all sections of the current edition of the United States Code (except Section 301 of title 5) which are cited by issuing agencies as rule-making authority for currently effective regulations in the Code of Federal Regulations. The lists shall be arranged in the order of the titles and sections of the United States Code with parallel citations to the pertinent titles and parts of the Code of Federal Regulations."

This handy finding aid lists United States Code statutes by title and section in the left column, if implementing regulations have been published in the Federal Register, and applicable regulations by title and part in the right. If the statute does not appear, it does not have implementing regulations which have been published in the Federal Register, signifying that, in accordance with 44 U.S.C.S. Sec. 1505(a)(1) provisions, the statute is applicable only to Federal agencies or the officers, agents, and employees of Federal agencies. If the statute number does appear and a regulation is cited, the regulation must be consulted to determine application.... [emphasis added]

What does all of this mean? It means that statutes from the United States Code which do not have implementing regulations have NO LEGAL EFFECT ON THE POPULATION AT LARGE!

All of the sections from 47 U.S.C. Chapter 5 - wire or radio communication - which have no implementing regulations that appear in the PTAR are:

Sec. 157 - New technologies and services

Sec. 159 - Regulatory fees

Sec. 213 - Valuation of property of carrier

Sec. 214 - Extension of lines or discontinuance of service...

Sec. 216 - Receivers and trustees; application of chapter

Sec. 217 - Agents' acts and omissions; liability of carrier

Sec. 222 - Competition among record carriers

Sec. 223 - Obscene or harassing telephone calls

Sec. 224 - Pole attachments

Sec. 226 - Telephone operator services

Sec. 228 - Regulation of carrier offering pay-per-call services

Sec. 306 - Foreign ships; application of section 301

Sec. 320 - Stations liable to interfere with distress signals...

Sec. 321 - Distress signals and communications...

Sec. 322 - Exchanging radio communications...

Sec. 323 - Interference between Government and commercial stations

Sec. 324 - Use of minimum power

Sec. 326 - Censorship

Sec. 327 - Naval stations...

Sec. 328 - Canal Zone; representation by Secretary of State

Sec. 329 - Administration of radio laws in Territories and possessions

Sec. 331 - Allocation of very high frequency television stations and AM radio stations

Sec. 333 - Willful or malicious interference

Sec. 335 - Direct broadcast satellite service obligations

Sec. 351 - Ship radio stations and operations

Sec. 353 - Radio equipment and operators

Sec. 353a - Operators and watches on radiotelephone equipped ships

Sec. 354 - Technical requirements...

Sec. 354a - Technical requirements...

Sec. 355 - Survival craft

Sec. 356 - Approval of installations by Commission

Sec. 357 - Safety information

Sec. 358 - Master’s control over operations

Sec. 359 - Certificates of compliance...

Sec. 361 - Control by Commission...

Sec. 603 - Transfers from Federal Radio Commission, Interstate Commerce Commission, and Postmaster General

Sec. 604 - Effect of transfer

Sec. 605 - Unauthorized publication or use of communications

Sec. 607 - Effective date of chapter

Sec. 608 - Separability

Sec. 609 - Short title

Sec. 610 - Telephone service for disabled

Sec. 611 - Closed-captioning of public service announcements

Sec. 612 - Syndicated exclusivity

Sec. 613 - Discrimination

The astute researcher, however, will notice from the PTAR that all sections from 301 to 609 ARE covered with a blanket of regulations found in 47 CFR Parts 80, 87 and 97. However, 47 CFR 80, 87 and 97 deal only with "the conditions under which radio may be licensed and used in the maritime services," "the conditions under which radio stations may be licensed and used in the aviation services," and "to provide an amateur radio service," NONE of which extend any FCC authority or jurisdiction over intrastate broadcasters!

("Amateur" or as they are commonly known, "ham" operators, may be particularly chagrined to learn that they VOLUNTEER to be regulated by the FCC by submitting to "examination." According to 47 CFR 97.5, titled "Station license required": "Any person who qualifies by examination" is "qualified to be an amateur operator," and therefore "must have been granted a station license of the type listed in paragraph (b)...before the station may transmit on any amateur service frequency...." A person qualifies by examination, is granted a license, and therefore submits to being regulated. Those who do not submit to examination are not required to be licensed, and, unless engaged in "interstate and foreign commerce," are not subject to regulation!)

CONCLUSION OF PART THREE

If any given regulation is not published in the Federal Register it does not apply to the population at large or the state republics. Sections that have no regulations are mandatory and/or enforceable only in the federal United States, inclusive of the District of Columbia and U.S.-owned territories. No implementing regulations exist for sections of 47 U.S.C. relating to, among other items, enforcement provisions, orders for payment of money, penal provisions, penalties, violation of rules or regulations, forfeitures, or trials which apply to broadcasters not engaged in "interstate and foreign commerce." Those statutes apply only to those involved in "interstate and foreign commerce," Federal agencies or persons in their capacity as officers, agents or employees thereof, those in the maritime or aviation services, or those who have volunteered to be regulated by submitting to FCC examination and qualification.

NOTE:

Attorney Larry Becraft sent me a message a while back, which said:

Dear Dave,

...I listened to the tape of (a popular radio-show host) reading your brief on FCC. You did

an admirable job, but there are some mistakes:

1. Regs: Your reliance upon CA Bankers is misplaced. That was a case involving the CTR

laws which are 100% dependent upon regs. Long ago when I was talking with Carl Granse, I sent in response to a question posed by him a brief on CTRs where I discussed the CTR regs. Carl jumped to the erroneous conclusion that ALL federal laws depend on regs, which is just simply not the case. That bad idea has floated all over the (place), and everybody accepted his assertion at face value, but it is wrong. Why don't you run over to LawFind and pull that case up and read it.

Some fed laws depend on regs, others don't. I hope this helps.

Larry

I replied:

Dear Larry,

Now, if I only knew how to determine which ones DO, and which DON'T! AAARGHH!

Dave

Having made the case that all federal statutes require implimenting regulations, one should also examine the possibility that some statutes need not this requirement.

California Bankers Assn. v. Schultz, 416 U.S. 21 is acase which deals with the so-called "Bank Secrecy Act of 1970," and, as noted above, about it the Supreme Court stated:

"...we think it important to note that the Act's civil and criminal penalties attach only upon violation of regulations promulgated by the Secretary; if the Secretary were to do nothing, the Act itself would impose no penalties on anyone...."

This statement, taken by itself, does seem to bolster the argument for all statutes needing implimenting regulations. Although the case does not give any clear reasons not to believe so, the Court does state the following in section B regarding it's decision on the "Fourth Amendment Challenge:"

"Since, as we have observed earlier in this opinion, the statute is not self-executing, and were the Secretary to take no action whatever under his authority (to issue regulations) there would be no possibility of criminal or civil sanctions being imposed on anyone..."

This statement indicates that some types of statutes may well be "self-executing," and need not require accompanying regulations in order for their implimentation to be effected. The Court's decision gives no definition of a "self-executing" statute, so the explanation must lie elsewhere, and will not be explored here. In order to effectually challenge the legitimacy of of an FCC statute using the "lack of implimenting regulations" argument, this potential challenge to the argument must be dealt with and eliminated before the argument can be perfected, and before the litigant can prevail. As always, it seems that even more research is in order!

Since Mr. Becraft is an attorney, and I am NOT, you should heed his comments in the context of this memorandum, and your own research.

PART FOUR: THE CASE AGAINST STEPHEN DUNIFER

A much popularized situation exists in Berkeley, California in which the FCC is attempting to prosecute Stephen Dunifer, a low-power broadcaster operating a station called Free Radio Berkeley (FRB). In the numerous legal documents posted on FRB's World Wide Web site, it can be learned that the FCC served Dunifer with a "Notice of Apparent Liability (NAL)" which cited, among other items, 47 CFR Sec. 15.29(a), 47 CFR Sec. 73.201, and 47 U.S.C. Sec. 503(b). The FCC also claimed that Dunifer had violated 47 U.S.C. Sec. 301, and claimed authority under 47 U.S.C. Sec. 303(n).

Attorneys for Dunifer, after making a rather weak challenge to the FCC's jurisdiction in the matter, based the bulk of his defense on a well-documented, passionate and eloquently stated claim that the FCC had violated Dunifer's First Amendment rights by refusing to grant licenses to his low-power station. This persuasive Constitutional defense led to the FCC, and much of the broadcasting community, being stunned when Judge Claudia Wilken, on January 30, 1995, in the U.S. District Court for the Northern District of California, refused to grant any injunction requested by the FCC against Dunifer.

While the case still awaits final disposition, and Judge Wilken's decision has been hailed as a victory for low-power broadcasters, Dunifer's Constitutional arguments become moot in light of the facts that:

(a) Dunifer was not involved in "interstate and foreign commerce".

(b) 47 CFR Part 15, Sec. 15.29(a) deals with "Inspection by the Commission" of equipment or devices "subject to the provisions of this part...," which takes us back to Sec. 15.1(b)(c) "Scope of this Part," which deals with licensing of devices "pursuant to the provisions of section 301 (47 U.S.C. 301 ("interstate and foreign commerce")),," with Sec. 15.1(c) stating that devices not in compliance with 47 CFR Part 15 are "prohibited" under 47 U.S.C. 302. However, Sec. 302 was REPEALED in 1936!

Clearly, anyone attempting to prosecute a "not-engaged-in-interstate-and foreign-commerce microbroadcaster" using this "47 CFR 15.29(a)" argument is either a complete idiot, or is engaged in a grand deception!

(c) 47 CFR Sec. 73.201 deals with FM broadcast channels assigned to stations engaged in "interstate and foreign commerce."

(d) 47 U.S.C. Sec. 503(b) has no implementing regulations published in the CFR relating to those involved in "intrastate" broadcasting or commerce. The only published regulations relating to 47 U.S.C. Sec 503(b) are those limited to the maritime, aviation and amateur services.

While Dunifer's persuasive Constitutional arguments may allow him to eventually prevail in his case, they are actually quite unnecessary in light of the fact that the FCC had no authority or jurisdiction over him to begin with!

UPDATE:

On June 16, 1998, Judge Wilkin granted a motion for summary judgement and injunction against Dunnifer and in favor of the FCC. Her decision was based in part upon the fact that Dunnifer had never actually applied for a license from the FCC, and she stated:

"Mr. Dunifer does not have standing as required by Article III of the United States

Constitution to challenge the Class D regulations as they have been applied to him; they have

not been applied to him because he has never applied for a license."

Therefore, it seems that for a microbroadcaster to perfect a challenge to the FCC's fraudulent licensing

schemes, it might be advantageous to have actually been denied a license!

The decision of Judge Wilkin is currently under appeal.

PART FIVE: CONCLUSION

On March 3, 1997, a reply was made by the FCC to an inquiry made by Mr. Eric Johnson, of Everett WA. Mr. Johnson's inquiry was sent to Reed Hunt, then-FCC Chairman, and read:

Dear Mr. Hunt:

I notice that you personally introduce your agency as being charged with regulating interstate and international communications consisting of almost all electronic methods. This leads me to ask you, does your agency, the Federal Communications Commission, have any jurisdiction over intrastate radio communications, meaning "within the state"?

If you do have jurisdiction, where may I find the implementing regulation in the Federal Register, and specifically, what section and paragraphs would pertain to radio transmissions that do not cross state borders?

Thank you very much in advance for your answer to me.

The reply reads, in part, as follows:

March 3, 1997

I've been asked to respond to your letter regarding intrastate radio communications, meaning "within the state." The FCC only regulates interstate and foreign commerce in radio communications. For your reference, I have enclosed a copy of Title 1, Section 2, (47 U.S.C. 152). Also enclosed are copies of other sections and titles referred to in Title 1. Respectively, they are Sections 223-227, Section 332, Section 301 Title VI, and Sections 201-205 of the Communications Act of 1934, as amended.

Intrastate, meaning "within the state," radio communications may be regulated by individual states, and I would recommend contacting your State Utility commission for further information.

Signed,

Martha E. Contee

Chief, Public Service Division

Office of Public Affairs

Federal Communications Commission
Washington, D.C. 20554

March 3, 1997

Mr. Eric Johnson
P.O. Box 2233
Everett, WA 98203

Re: Certified Mail #P267185539

Dear Mr. Johnson:

I have been asked to respond to your letter regarding *intra*-state radio communications.

The FCC only regulates *inter*-state and foreign commerce in radio communications. For your reference, I have enclosed a copy of Title I, Section 2 [47 U.S.C. 152]. Also enclosed, are copies of other sections and titles referred to in Title I. Respectively they are: Sections 223-227, Section 332, Section 301, Title VI, and Sections 201-205, of the Communications Act of 1934, As Amended.

Intra-state radio communications may be regulated by individual states, and I would recommend contacting your State Utility Commission for further information. The address and phone number(s) for the utility commission in the state of Washington is:

Sharon Nelson, Chairman
Utilities and Transportation Commission
P.O. Box 47250
Olympia, WA 98504-7250
(360) 753-6423
Toll free in WA (800) 562-6150
Fax: (360) 586-1150
TTY: (360) 586-8206

If you have any questions, or require further information, please contact me at (202) 418-0260.

Sincerely,

Martha E. Contee
Chief, Public Service Division
Office of Public Affairs

Enclosure(s)

_____

It seems that the FCC clearly understands its authority and jurisdiction but, because of fear, ignorance, and apathy on the part of the population at large, has engaged in unauthorized actions under the “color of law.” Such actions are OUTSIDE of the law, and as such, are ILLEGAL. Such actions can and have been vigorously and successfully opposed by those who understand the law and their rights as citizens. When confronted by an informed and unafraid citizenry, the FCC has no choice but to obey the laws under which it was created.

—end of David Moore memo.

[end of copy of letter to FCC Chair]

Conclusionary comments on next page...

Conclusionary comments by Jonathan Higbee:

It is my hope that all these documents will help the FCC be a more friendly organization. Shutting down low power broadcasters when you have no authority to do so is inappropriate.

I suppose the one with the power to put people in jail can make up their own rules and interpretations though. As such, even if the FCC feels they must prosecute a microbroadcaster, they should FIRST give them a call and warn them to stop what they are doing.

We are humans. We are people. We are not robots. Be friendly. Be open. Fight for the right of the INDIVIDUAL to use the spectrum they OWN. Your really have no right to restrict a resource that belongs to everyone, especially not in the zealous and heavy handed and robotic manner you have done in the past.

Please act to acknowledge a maximum amount of freedom for microbroadcasters. Please act to free those you have persecuted and prosecuted in the past. Please act to be more human and less robotic. Please act such that you put the INDIVIDUAL CITIZEN at the top of your priority, rather than big business / big government.

Sincerely,

Jonathan C. Higbee

February 5, 1999

Filied electronically via http://www.fcc.gov/e-file/ecfs.html